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The UN General Assembly Vote: Upgrading the Status of Palestine and Its Implications for a Possible Role of the ICC

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Background

In 2009 the Palestinian Government, a non-State Party, lodged a Declaration (the “2009 Declaration”) with the International Criminal Court (ICC) under Article 12(3) of the ICC Statute accepting the exercise of jurisdiction of the ICC for ‘acts committed on the territory of Palestine since 1 July 2002.’¹ The purpose of the Declaration was to invite the Office of the Prosecutor (OTP) of the ICC to investigate claims of possible war crimes and crimes against humanity allegedly committed by Israeli Defense Forces (IDF) during the 2008-2009 Operation Cast Lead, as documented by the Goldstone Report.² However, in April 2012 the OTP declined to accept jurisdiction. It justified its decision based on the fact that Palestine had, at the time, only the status of an ‘Observer Entity’ at the United Nations (UN). For the OTP, it was up to the UN General Assembly (UNGA) or the Assembly of State Parties (ASP) of the ICC to determine whether Palestine could qualify as a state for the purposes of the ICC Statute. Until such determination was made, the OTP would be unable to proceed.³

On the 29 November 2012, the UNGA voted overwhelmingly — 138 in favour to 9 against (Canada, Czech Republic, Israel, Marshall Islands, Micronesia (Federated States of), Nauru, Panama, Palau, United States), with 41 abstentions — to accord Palestine ‘Non-Member Observer State’ Status in the UN.

The reaction to the UNGA vote in favor of the new status for Palestine has been swift from various camps. The Israelis expressed their opposition by noting that ‘the route to peace ran through direct negotiations between Jerusalem and Ramallah.’⁴ The emphasis on a political solution was also at the heart of the European Union delegation’s statement, which interpreted the vote as an impetus for moving forward with restarting the dialogue between the two camps.

On 29 November 2012, the General Assembly of the United Nations (UN) voted overwhelmingly to accord Palestine ‘Non-Member Observer State’ Status in the UN. In the first part of this Policy Brief, the implications of upgrading the status of Palestine with regard to the possible role of the International Criminal Court (ICC) will be assessed. In April 2012, the Office of the Prosecutor of the ICC declined to accept jurisdiction for acts committed on the territory of Palestine since 1 July 2002, justifying its decision based on the fact that Palestine had, at the time, only the status of an ‘Observer Entity’ at the UN. Subsequently, it will be analysed if the Palestinian pursuit of its cause before the ICC can be considered as an effective lawfare strategy or rather as a poisoned chalice.

The Palestinians could not agree more, but they also believe that the elevation of Palestine’s status at the UN would even the playing field between Israel and Palestine, by granting the latter access to the full range of protection under the international criminal law regime. This newly gained status seems to give Palestinian officials some of the leverage they believe they lacked in their negotiations with Israel, especially regarding the issue of Israeli settlements.

Is the UN General Assembly Vote a Real Game Changer?

But how much of a real game changer is the UNGA vote as it relates to the jurisdiction of the ICC? The answer is not quite straightforward. However, in its April 2012 decision to decline

jurisdiction on the basis of the 2009 Declaration, the Office of The Prosecutor expressly relied on the practice of the Secretary General as treaty depositary and, in turn, on determinations by the ‘competent organs’ of the UN, and by the General Assembly in particular. Given this fact, it seems now more difficult for the OTP to maintain the position that it may not proceed with an examination of international crimes alleged to have been committed in Gaza and the West Bank.⁵ This is even more so in light of a recent statement by the new ICC Prosecutor Fatou Bensouda. In September 2012, Bensouda stated that ‘[w]hat we have also done is to leave the door open and to say that if this [...] if Palestine is able to pass over that (statehood) hurdle, of course, under the General Assembly, then we will revisit what the ICC can do’.⁶

If the OTP decides however to decline jurisdiction on the basis of the 2009 Declaration, as an alternative the Palestinian Government could come under the jurisdiction of the ICC by ratifying the ICC Statute. Instruments of ratification are to be deposited and accepted by the Secretary-General of the UN.⁷ It seems likely that the UN Secretary-General would follow the lead of the General Assembly and the UN Educational, Scientific and Cultural Organization (UNESCO) in considering Palestine a state for the purposes of treaty ratification.

However, even assuming that Palestine is accepted by the OTP as being a state for the purposes of Article 12(3) of the ICC Statute, or alternatively Palestine ratifies the ICC Statute, and the Palestinian situation thus comes under the jurisdiction of the ICC, there remain a number of other legal issues to be taken into consideration.

Firstly, it is not clear if the acceptance of the 2009 Declaration or a Palestinian ratification could apply retroactively all the way back to July 2002, when the ICC Statute entered into force, and thus well before 29 November 2012, the date of the UNGA resolution upgrading the status of Palestine. It is probably correct to assume that Palestine was already a state before the UNGA resolution. That said, it would not seem irrational for the Court to conclude that Palestine existed as a State at least prior to Operation Cast Lead in December 2008. After all, by that time more than 125 states had recognized Palestine and a strong case can be made that Palestine has long satisfied the objective requirements for statehood provided by the Montevideo Convention — population, defined territory, government, and the capacity to enter into relations with other states.⁸

Any determination that a Palestinian declaration or ratification applies retroactively is however only the starting point. To open an investigation the OTP must also consider Article 53 of the ICC Statute. Under Article 53, three benchmarks are to be taken into consideration before the OTP can decide to proceed with an investigation.

To start with, the OTP is to consider whether there is a ‘reasonable basis’ to believe a crime within the jurisdiction of the Court has been committed.⁹ Since the ‘reasonable basis’ standard is the lowest evidentiary standard in the ICC Statute, the information available to the OTP is neither expected to be ‘comprehensive’ nor ‘conclusive’ if compared to the information gathered during the investigation and trial phases. Since the Goldstone Report indicated that crimes against humanity and war crimes ‘likely’ occurred during Operation Cast Lead, this first benchmark will probably not pose much of a problem.

Subsequently, the second benchmark consists of a reference to the principle of complementarity as enshrined in Article 17 of the ICC Statute.¹⁰ This requires an examination as to whether the relevant state(s) (in casu Israel and Palestine) is/are conducting or has/have conducted national proceedings in relation to the groups of persons and the crimes allegedly committed during those incidents, which together would likely form the object of the Court’s investigations.¹¹ Furthermore, the proceedings must have been carried out genuinely¹² and must have been conducted independently or impartially.¹³ At this point in time, it seems that the crimes committed on Palestinian territory would be admissible before the ICC. No investigations of Hamas rocket assaults into Israel have been carried out by the Palestinian authorities. While Israel has a track record of conducting at least some investigations into war crimes committed during Operation Cast Lead, Amnesty International for instance has labelled them as failing ‘to meet international standards of independence, impartiality, transparency, promptness and effectiveness’¹⁴, which would make potential cases against Israeli officials admissible before the ICC.

Lastly, the OTP is required to take into account the gravity of the crime and to assess whether there are substantial reasons to believe that an investigation would serve the interests of justice.¹⁵ While it seems undisputable that crimes committed, for instance, during Operation Cast Lead, are grave enough to warrant the opening of an investigation, the OTP might decline to open an investigation on the basis of the interests of justice notion. In 2007, the OTP issued a Policy Paper on the notion of ‘interests of justice’. While the Paper clearly speaks in favor of investigations or prosecutions and of the exceptional nature of interests of justice¹⁶, it also highlights that it could take into consideration ongoing peace processes.¹⁷ Given the highly fraught, political nature of any investigation into Israeli or Palestinian crimes, the OTP may decline to go forward, arguing that an investigation would not serve the interests of justice. In particular, commentators have pointed out that the issue of Israeli settlements is one that should be decided politically, rather than by the ICC.¹⁸

Palestine Pursuing Its Cause Before the ICC: an Effective Lawfare Strategy or a Poisoned Chalice?

How should one assess Palestine's pursuit of its cause before the ICC on the basis of the 2009 Declaration, or alternatively, in case the OTP declines jurisdiction on the basis of the latter Declaration, by ratifying the ICC Statute? Would an investigation by the ICC be an effective 'lawfare' tool that would provide the Palestinian Government important leverage in its negotiations with Israel, or would it be a poisoned chalice?

The answer is of course not clear-cut, but the Palestinians should be careful what they wish for. The Palestinians stand to both lose and win the most; with the final balance depending on what they value more: subjecting Israel's settlement plans and military interventions in the West Bank and Gaza to greater legal scrutiny versus shielding domestic militant groups and leaders from the reach of the ICC.

On the one hand, it goes without saying that the decision taken by the Palestinian Government to pursue its cause before the ICC could affect Israeli actions both in terms of the settlement construction in West Bank and East Jerusalem, as well as its military incursions into the Occupied Territories (OT). In a letter addressed to the Secretary-General of the UN and the President of the UN Security Council immediately following the UN General Assembly vote, the Permanent Observer of Palestine to the UN reiterated the Palestinian delegation's position that 'all Israeli settlement activities are illegal, constituting grave breaches of article 49 (6) of the Fourth Geneva Convention and thus constituting war crimes, as further determined in accordance with [...] article 8 (2) (b) (viii) of the Rome Statute of the International Criminal Court. Israel, the occupying Power, must be held accountable for all of the war crimes it is committing against the Palestinian people'.¹⁹

The letter was later approvingly cited by the most recent UN Human Rights Council (UNHRC) report of February 2013 which also found Israel, as an occupying power, in violation of Article 49 of the Fourth Geneva Convention for 'transferring parts of its civilian population into territory that it occupies'.²⁰

The implication in both documents is clear: the Palestinians see the ICC as an instrument of compliance aimed at what they consider Israel's ongoing violations of international law. Furthermore, some have suggested that Palestinians stand to win from the Court's involvement in the future simply by making the settlement issue politically toxic for Israeli politicians; not to mention the possibility that should the Court find Israeli officials criminally liable for their involvement in the settlement construction programme, the verdict would have an immediate impact on criminalizing do-

nations subsidising the settlement construction by individuals living abroad (e.g. United States) and could help move forward the peace process.²¹

On the other hand however, the Palestinian Government might want to reconsider its strategy. It has been argued, for example, that should the Court's jurisdiction be extended over the situation in Palestine, prosecutions of Hamas' crimes might proceed more easily than similar prosecutions of Israeli crimes.²² In the eyes of some, prosecuting Hamas' officials for the organisation's attacks on Israeli civilians might prove an easier task than holding Israeli officials accountable for Israel's disproportionate military attacks on Palestinian civilians, the collective punishment of Palestinians, and the transfer of Israeli civilians into occupied territories. The latter crimes are fraught with ambiguity and difficult to prove.²³

Furthermore, Palestine, after having lodged a Declaration under Article 12(3) of the ICC Statute or having ratified the ICC Statute, would have a duty to cooperate with investigations and implement arrest warrants, while Israel would not have such a legal obligation.

In addition, Palestinian civilian and military officials from across the political spectrum, both in Gaza and in the West Bank, could find themselves the target of OTP investigations and/or prosecutions with the Palestinian Government unable to stop any such investigations and/or prosecutions. Such investigations and/or prosecutions would inevitably invite more instability in the Occupied Territories, as Hamas and militant organisations operating in the territories express their disapproval of increased legal scrutiny.

What is also very likely is that the Prosecutor will be sensitive to the need to seem impartial, which means that investigations and/or prosecutions against Israeli officials will inevitably be balanced by investigations and/or prosecutions of Palestinian officials. Here, the aforementioned principle of complementarity plays an important role, making the Palestinians the more likely target of ICC prosecutions. Under the principle of complementarity, the Court must defer to national jurisdictions should the latter demonstrate that they are both able and willing to prosecute their citizens for crimes that fall under the jurisdiction of the ICC. In this case, the balance is again tilted in favor of Israel.

Israel does have a generally well-regarded and respected judicial system and, as already stated, has at times prosecuted its citizens for acts against the Palestinian population. While it is true that such prosecutions have rarely resulted in guilty verdicts and are not seen as impartial, it would be more difficult for the OTP to find Israel's judicial system unable or unwilling to prosecute. On the other hand, much

like in Kenya and more recently in Libya where the ICC asserted its authority over the objections of the national courts, it would be difficult for the Palestinians to claim that any of its citizens indicted for war crimes or crimes against humanity would get a hearing from an able or willing court, especially given the current division between a Fatah-led West Bank and a Hamas-led Gaza Strip.

The end result would be that Palestinian officials both in the West Bank and Gaza will either find themselves in the Hague mounting their defense in what can be a very lengthy and financially draining process, or will be forever on the run, thus undermining the Court's legitimacy in the region and the Palestinian government's ability to wield the specter of the Court's justice over the head of Israeli officials.

Conclusion

The UN General Assembly vote has ushered in a new era for Palestine. By elevating its status from an 'Observer Entity' to a 'Non-Member Observer State', the Palestinians can now begin to contemplate the possibilities that full statehood offers. Meanwhile, they must make some important choices about how they leverage this new status and what international instruments they avail themselves of to turn that hope into reality. The above discussion leaves no doubt that those choices will not be easy. Jurisdiction of the ICC on the basis of the 2009 Declaration or a Palestinian ratification of the ICC Statute can provide the Palestinian government with a much-needed leverage in its negotiations with Israel. But doing so comes with a set of risks that the Palestinian officials would do well to contemplate. Regardless, by enabling the elevation of the Israeli-Palestinian conflict into a legal argument, the UN General Assembly vote has already proven a game changer.

Notes

¹'Declaration recognizing the Jurisdiction of the International Criminal Court', available at: <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4C8071087102C/279777/20090122PalestinianDeclaration2.pdf>

²UN General Assembly, Human Rights Council, 'Human Rights in Palestine and Other Occupied Arab Territories. Report of the United Nations Fact-Finding Mission on the Gaza Conflict', 25 September 2009.

³'Update on Situation in Palestine', para. 7, available at: <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>

⁴UN General Assembly, 'General Assembly votes overwhelmingly to accord Palestine 'non-member observer state' status in United Nations, 29 November 2012.

⁵J. CERONE, 'Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State', American Society of International Law Insight, 7 December 2012.

⁶J. SCHUMAN, 'Analysis: The next stop for Palestinians could be global courts', Reuters, 29 November 2012.

⁷Article 125(2) and (3) ICC Statute.

⁸K.J. HELLER, 'Palestinian Statehood and Retroactive Jurisdiction', *Opinio Iuris*, 1 December 2012.

⁹Article 53(1)(a) ICC Statute.

¹⁰Article 53(1)(b) ICC Statute.

¹¹ICC, Situation in Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, paras. 50, 52.

¹²Article 17(1)(a) ICC Statute.

¹³Article 17(2)(c) ICC Statute.

¹⁴Amnesty International, 'Latest Israeli response to Gaza investigations totally inadequate', 2 February 2010.

¹⁵Article 53(1)(c) ICC Statute.

¹⁶Office of the Prosecutor, Policy Paper on the Interests of Justice 2007, REF-ICC-OTP-InterestsOfJustice, 1

¹⁷Office of the Prosecutor, Policy Paper on the Interests of Justice 2007, REF-ICC-OTP-InterestsOfJustice, 8-9.

¹⁸L. M. KELLER, 'The International Criminal Court and Palestine: Part II', *JURIST - Forum*, 5 February 2013

¹⁹UN General Assembly, Tenth emergency special session, A/ES-10/573; S/2012/899.

²⁰UN General Assembly, Human Rights Council, 'Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem', 7 February 2013.

²¹C. MCGREAL, 'International criminal court is a lever for Palestinians on Israeli settlements', *The Guardian*, 15 December 2012.

²²J. TRAHAN & B. COOPER, 'ICC membership may hurt Palestinians, Hamas more than Israel', *Christian Science Monitor*, 5 December 2012.

²³K. J. HELLER, 'Yes, Palestine Could Accept the ICC's Jurisdiction Retroactively', *Opinio Iuris*, 29 November 2012.



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